SUPREME COURT OF THE UNITED STATES.

No. 258.

WILLIAM S. GODBE, PLAINTIFF IN ERROR,

vs.

TOOTLE, LEACH AND COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

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1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the supreme court of the Territory of Utah, greeting:

Because in the record and proceedings, as also in the rendition of judgment, in a plea which is in the said supreme court before you, between Wm. S. Godbe, appellant, and Tootle, Leach, & Co., appellees, a manifest error hath happened to the great damage of said appellants, plaintiffs in error herein, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if the judgement be thereupon given, that then, under your seal, distinctly and openly, you send the record and proceedings therein, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington City, D. C., on the first Monday of December next, A. D. 1869, in the said Supreme Court to be then and there held, that
2 the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 2nd day of August, A. D. 1869, and of the independence of the United States of America the ninety-fourth.

[SEAL.] W. I. APPLEBY,
Clerk of Supreme Court for the Territory of Utah.

3 (Indorsed:) In error. Supreme Court of the United States. Wm. S. Godbe, pl'ff, vs. Tootle, Leach & Co., def'ts. Writ of error.

Filed in the clerk's office of the supreme court U. T. August 2d, A. D. 1869.

W. I. APPLEBY, *Clerk.*

4 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

WM. S. GODBE
vs.
TOOTLE, LEACH & Co. } In error.

Wm. S. Godbe, the above-named pl'ff in error, being duly sworn, deposes and says that the appeal on error in this cause is not taken for the purpose of delay but to the end that full & speedy justice may be done to the parties therein.

W. S. GODBE.

Subscribed and sworn to before me the 2nd day of August, A. D. 1869.

[SEAL.] W. I. APPLEBY,
Clk S. Court, Utah.

5 (Indorsed:) In error. In the Supreme Court of the United States. Wm. S. Godbe vs. Tootle, Leach & Co. Aff't of merits.

Filed in the clerk's office of supreme court U. T. August 2nd, A. D. 1869.

W. I. APPLEBY, *Clerk.*

6 *Copy of bond.*

Know all men by these presents, that we, Wm. S. Godbe, as principal, and W. H. Hooper and H. W. Lawrence, as sureties, residents of Salt Lake County, Territory of Utah, are held and firmly bound unto Thomas E. Tootle, Richard Leach, and Thomas K. Hanna, parties under the firm, name, and style of "Tootle, Leach & Co.," in the sum of five thousand five hundred dollars, lawful money of the United States of America, to be paid to the said Tootle, Leach & Co., their executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the second day of August, A. D. one thousand eight hundred and sixty-nine.

The condition of the above obligation is such that, whereas the above-bounden Wm. S. Godbe hath prosecuted a writ of error to the Supreme Court of the United States of America to reverse the judgment rendered in the supreme court of the Territory of Utah, in a suit wherein Wm. S. Godbe was appellant and the said Tootle, Leach & Co. appellees, on appeal in the said supreme court of Utah Territory, from the district court in and for the third judicial district of said Territory:

7 Now, therefore, the condition is such that if the above-named Wm. S. Godbe shall prosecute his said writ to effect, and answer all damages and costs, together with just damages for delay, if he fail to make good his plea, then this obligation to be void; otherwise the same shall be and remain in full force and virtue.

W. S. GODBE. [SEAL.]
W. H. HOOPER. [SEAL.]
H. W. LAWRENCE. [SEAL.]

Signed, sealed, and delivered in the presence of—
F. A. MITCHELL.
I. W. LATEY.

Endorsed: The within bond is, this second day of August, A. D. 1869, approved.

C. M. HAWLEY,
Associate Justice of the Supreme Court for the Territory of Utah.

Filed in the clerk's office of the supreme court for U. T. August 2nd, A. D. 1869.

W. I. APPLEBY, *Clerk, &c.*

8 TERRITORY OF UTAH, *City & County of Salt Lake, ss:*

I, W. I. Appleby, clerk of the supreme court for the Territory of Utah, do certify that the foregoing is a true copy of the original bond filed in the case of W. S. Godbe, plaintiff in error, vs. Tootle, Leach & Co., defendants in error, August 2nd, 1869, with the approval of the same, &c., endorsed thereon; as by me copied and carefully compared with the original, as remaining on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in S. L. City, U. T., August 2nd, A. D. 1869.

[SEAL.] W. I. APPLEBY, *Clerk, &c.*

9 In the Supreme Court of the United States.

WM. S. GODBE, PL'FF,
vs.
TOOTLE, LEACH & CO., DEF'T. } In error.

Judgment of the supreme court of Utah affirming judgment of the district court in & for the third judicial district, Territory of Utah.

To the clerk of the said supreme court of Utah:

You will please issue a writ of error in the above-entitled cause to the said supreme court of Utah Territory, at the suit of Wm. S. Godbe, plaintiff in error, returnable to the Supreme Court of the United States, at Washington, D. C., on the 1st Monday of December next, A. D. 1869, in the said Supreme Court to be then and there held.

Salt Lake City & County, U. T., July, A. D. 1869.

MARSHALL & CARTER,
Att'ys for Pl'ff.

10 (Indorsed:) In error. In the Supreme Court of the United States. Wm. S. Godbe vs. Tootle, Leach & Co. Order for writ.

Filed in the clerk's office of the supreme court U. T. August 2nd, A. D. 1869.

W. I. APPLEBY, *Clerk.*

11 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

PLAINTIFF WM. S. GODBE
vs.
DEF'TS TOOTLE, LEACH & CO. } Assignment of errors.

The said plaintiff in error, Wm. S. Godbe, complains of the said defendants, Tootle, Leach & Co., for that the said Tootle, Leach & Co., at the July term, A. D. 1869, of the supreme court of the Territory of Utah, on the 26th day of July, A. D. 1869, recovered a judgment by the consideration of said court against the plaintiff aforesaid, in a certain appeal then pending in said court, wherein the said Wm. S. Godbe was appellant and the said Tootle, Leach & Co., appellees copy, a of the record and proceedings in which case, duly certified, is hereto attached. And the said Wm. S. Godbe avers that there is error in the said record and proceedings in this, to wit:

The court erred in affirming the judgment of the district court of the third judicial district, Territory of Utah, and in not reversing said judgment.

For that the said district court erred in this, to wit:

12 First. The court in refusing to permit John M. Worley, co-defendant of the said Wm. S. Godbe, to testify in behalf of said Godbe, a default having been theretofore taken against said Worley.

Second. The court erred in refusing to permit the said John M. Worley to testify in behalf of his co-defendant, Wm. S. Godbe, after the said Wm. S. Godbe tendered in court a release to the said John M. Worley and a discharge from all claims growing out of the subject-

matter of the action, and tendered an amount of money in court sufficient to cover all costs which had then accrued, and all possible costs.

Third. Defendant Wm. S. Godbe offered to prove the insolvency of the said Worley, and that he had in his own petition been declared bankrupt but not yet discharged, the court erred in refusing to allow Wm. S. Godbe to prove such insolvency, and in again excluding said Worley from testifying.

13 Fourth. The court erred in refusing to permit the said John M. Worley to testify on behalf of his co-defendant, Wm. S. Godbe, as he was clearly competent under the law of Congress approved July 2, 1864.

Wherefore the said Wm. S. Godbe, plaintiff in error, herein prays that the said judgment may be reversed, and the said plaintiff restored to all things he has lost by reason thereof.

WM. S. GODBE,
By his attorniess, MARSHALL & CARTER.

Let the writ issue on the within assignment of errors.
Salt Lake City, Aug't 2d, 1869.

C. M. HAWLEY,
Associate Justice of the Supreme Court of Utah Territory.

14 (Indorsed:) In error. In the Supreme Court of the United States. Wm. S. Godbe vs. Tootle, Leach & Co. Assignment of errors.

Filed in clerk's office of the supreme court U. T. August 2nd, A. D. 1869.

W. I. APPLEBY, *Clerk.*

15 UNITED STATES OF AMERICA, *ss:*

To Thomas E. Tootle, Richard Leach, & Thomas R. Hanna, partners, under the firm, name, & style of Tootle, Leach & Co., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Utah, wherein Wm. S. Godbe is pl'ff in error, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be arrested, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this second day of Aug't, A. D. 1869.

C. M. HAWLEY,
Associate Justice of the Supreme Court of Utah Territory.

16 TERRITORY OF UTAH, *ss:*

James M. Carter, being duly sworn, deposes and says that he is an att'y of the said Wm. S. Godbe, pl'ff in error; that on the 2d day of Aug't, A. D. 1869, he served a full, true, and correct copy of the within citation on R. N. Baskin, esq'r, att'y of record of the within def'ts in error, by reading the original citation, & leaving said copy with said R. N. Baskin.

JAMES M. CARTER.

Subscribed and sworn to before me the 2d day of August, A. D. 1869.
[SEAL.] W. I. APPLEBY, *Clerk, &c.*

I, R. N. Baskin, attorney of record of Tootle, Leach & Co., in the within case, hereby acknowledge service of the within citation this 2d day of August, A. D. 1869.

R. N. BASKIN,
Att'y of Tootle, Leach & Co.

(Indorsed:) In error. In the Supreme Court of the United States. Wm. S. Godbe vs. Tootle, Leach & Co. Citation.

Filed in the clerk's office of the supreme court U. T. August 2nd, A. D. 1869.

W. I. APPLEBY, *Clerk.*

17 *Transcript of record &c.—Proceedings in the case of Wm. S. Godbe, appellant, vs. Tootle, Leach & Co., appelles, had in the supreme court for the Territory of Utah, July term, A. D. 1869.—Marshal & Carter, esq'r's, of Salt Lake City, attornies for appellant.—R. N. Baskin, esq., of S. L. City, attorney for the appellees.*

18 Transcript of the record and proceedings had in the supreme court in and for the territory of Utah, at the adjourned July term, A. D. 1869, held in Salt Lake City, wherein William S. Godbe was appellant, and Tootle, Leach & Co., appellees, on appeal from the district court in and for the 3d judicial district for said Territory. Hon. C. C. Wilson, chief justice, presiding, & Hons. O. F. Strickland & C. M. Hawley, associate justices.

Record.

1869.
June 8. Marshall & Carter, attornies for William S. Godbe, appellant, vs. Tootle, Leach & Co, appellees, filed a transcript of the record and proceedings had in the 3d district court below, for said Territory, wherein Tootle, Leach & Co. were plaintiffs, and William S. Godbe and John M. Worley were the defendants; cause docketed for a hearing at the adjourned July term of said supreme court, A. D. 1869.

July 22d. The case of William S. Godbe, appellant, vs. Tootle, Leach & Co., appellees, was called, Marshall & Carter, esq's, attornies, appearing for the appellant, & R. N. Baskin, esq.,
19 attorney for the appellees.

Mr. Marshall opened his argument in the cause on the part of the appellant, followed by Mr. Baskin for the appellees.

Argument concluded by Mr. Marshall for the appellant; and

Thereupon the case was submitted to the court on the record and argument, for its decision thereon.

Court held the same under advisement.

July 26. In the case of William S. Godbe, appellant, vs. Tootle, Leach & Co., appellees, heretofore argued and held under advisement by the court, the court rendered the following judgment, to wit:

"Wherefore, by reason of the law and the premises aforesaid, it is ordered and adjudged by the court, that the judgment of the court below be in all respects affirmed, and that the said cause be remanded, with a special mandate from this court, to the clerk of said district court, to proceed to the collection of said judgment in all respects as if no appeal had been taken.

"And it is further ordered and adjudged that said appel-
20 lees have and recover judgment in this court against said appellant for all costs herein taxed and incurred by reason of said appeal, amounting to the sum of nine dollars and five cents, and that execution issue therefor."

July 26. Whereupon the appellant, William S. Godbe, by his attornies, Marshall & Carter, gave notice in open court that he would appeal the case to the Supreme Court of the United States at Washington City.

21 *Proceedings for and on allowance for writ of error.*

1869.

August 2d. William S. Godbe, plaintiff in error, vs. Tootle, Leach & Co., defendants in error, to the Supreme Court of the United States, at Washington City, D. C., from this court, filed an affidavit in said cause, stating, on oath, that the appeal in error in this cause is not for the purpose of delay, but to the end that full and speedy justice may be done to the parties therein.

" " Same day plaintiff in error filed his bond in the sum of five thousand five hundred dollars ($5,500\frac{00}{100}$) given to the defendants in error, with W. H. Hooper & H. W. Lawrence, of Salt Lake City, as sureties, which said bond was this day duly approved by the Hon. C. M. Hawley, associate justice of the supreme court of the Territory of Utah.

" " At the same time plaintiff's attornies, Marshall & Carter, filed a "precipe" for a writ of error to issue in said cause.

" " Same day plaintiff in error, by his attornies, filed his assignment of errors in said cause.

22 Endorsed:

Aug 2d. Let the writ issue on the within assignment of errors.
Salt Lake City, August 2d, A. D. 1869.
C. M. HAWLEY,
Associate Justice of the Supreme Court of Utah Territory.

" " Same day the clerk issued a writ of error in said cause, and made returnable to the Supreme Court of the United States, at Washington City, D. C., on the first Monday of December next, A. D. 1869.

Endorsed:
Filed in the clerk's office of the Supreme Court U. T. August 2nd, A. D. 1869.
W. I. APPLEBY, *Clerk, &c.*

" " Same day a certified copy of said writ of error was lodged and filed in the clerk's office of this court by Marshall & Carter, attornies for the plaintiff in error.

23 Endorsed as follows, viz:

Aug. 2. WM. S. GODBE, PL'FF IN ERROR,
vs.
TOOTLE, LEACH & CO., DEF'D'TS IN ERROR.

Copy of a writ of error lodged in pursuance of the statute of the United States in such case made and provided for the above-named Tootle, Leach & Co., defendants in error.
Salt Lake City, August 2nd, 1869.
MARSHALL & CARTER,
Att'ys for Pl'ff.

" " A citation to said defendants in error issued the same day, signed by the Hon. C. M. Hawley, associate justice of the supreme court for the Territory of Utah, a copy of which was served on defendants' attorney, R. N. Baskin, esq., by J. M. Carter, esq., one of the counsel for plaintiff in error, and the original was duly returned and filed the same day, with the affidavit of service made thereon.

24 Endorsed as follows, viz:

Aug. 2. TERRITORY OF UTAH, *ss:*

James M. Carter, being duly sworn, deposes and says that he is an attorney of the said William S. Godbe, plaintiff in error; that on the second day of August, A. D. 1869, he served a full, true, and correct copy of the within citation on R. N. Baskin, esq., attorney of record of the within defendants in error, by reading the original citation, and leaving said copy with said R. N. Baskin.

JAMES M. CARTER.

Subscribed & sworn to before me August 2d, A. D. 1869.
[SEAL.] W. I. APPLEBY, *Clerk, &c.*

Further endorsed:

" " I, R. N. Baskin, attorney of record of Tootle, Leach & Co., in the within case, hereby acknowledge service of the within
25 citation this 2nd day of August, A. D. 1869.
Aug. 2. R. N. BASKIN,
Att'y for Tootle, Leach & Co.

" " Clerk the same day made a duplicate copy of the bond, filed in said cause, duly certified, to be forwarded with a copy of the record and proceedings to the Supreme Court of the United States, at Washington City, D. C.

" " Clerk also made a duplicate copy of the assignment of errors in said cause, and filed in this office for the benefit of the defendants in error.

26 Copy of transcript of the record and proceedings had in the 3d district court in and for the Territory of Utah, wherein Tootle,

Leach & Co. were plaintiffs, vs. William S. Godbe & John M. Worley, defendants, and appealed by said defendant Godbe to the supreme court in and for said Territory of Utah, and filed in the clerk's office of said supreme court June 8th, A. D. 1869.

W. I. APPLEBY,
Clerk of said Supreme Court.

27 TRANSCRIPT IN APPEAL.

Complaint.

TERRITORY OF UTAH, *Salt Lake County:*

District court for the third district.

TOOTLE, LEACH & CO., PL'FFS,
vs.
WILLIAM S. GODBE & JOHN M. WORLEY, DEF'D'TS.

Thomas E. Tootle, Richard Leach, and Thomas K. Hanna, partners in trade, in Virginia City, Montana, under name and firm style of "Tootle, Leach & Co.," complain of William S. Godbe and John M. Worley, and for cause say, that said defendants, heretofore in Salt Lake City, made their certain contract or obligation in writing, and delivered the same for a valuable consideration to plaintiffs, which contract or obligation is in words and figures following, to wit:

"SALT LAKE CITY, *Nov. 10th*, 1865.

"On or before the first day of August next, we, or either of us,
28 promise to pay or deliver to 'Tootle, Leach & Co.,' or order, at Virginia City, Montana Territory, two hundred sacks of good merchantable Salt Lake flour in good order and condition, (each sack to contain ninety-eight pounds,) for value received, negotiable and payable without defalcation or discount.

"W. S. GODBE.
"J. M. WORLEY."

Plaintiffs state that "Salt Lake flour," such as is mentioned in said contract, was worth, and selling in Virginia City, Montana, at the time of the maturity of said contract, at seventeen (17) dollars per sack, and that the value of the entire amount of flour mentioned in said contract, at the time of maturity thereof, was three thousand one hundred dollars; that defendants wholly neglected and failed to deliver said flour, or any part thereof, to plaintiffs at the time of the maturity of said contract; but long after, to wit, on the 23d day of May, 1867, defendants did deliver to plaintiffs thirty sacks of flour, which plaintiffs received from defendants, agreeing to give them credit for whatever sum they realized for said flour; that plaintiffs sold said flour at eight dollars per sack, amounting to the sum of two hundred and forty dollars, which was the most said flour would sell for when delivered by defendants, and
29 which sum is endorsed as a credit on said contract or obligation; plaintiffs have received the further sum of seventy (70) dollars from defendants 7th day of December, 1867; plaintiffs state that they have been greatly damaged by reason of the neglect and failure of defendants to deliver said flour in conformity with the terms mentioned in said contract, to wit, in the sum of thirty-four hundred dollars, less the sum of three hundred and ten ($310) dollars so as above received by plaintiffs in said contract, wherefore plaintiffs pray judgment against

defendants for the sum of [of] three thousand and ninety dollars, being a balance due by reason of the breach of said contract, together with damages, as interest on said sum of three thousand and ninety dollars, at ten per cent. per annum, since August first, 1866.

BASKIN & DE WOLFE,
Atty's for Plaintiffs.

Personally appeared before me, on the 12th day of September, 1868, James R. Boyce, who, being duly sworn, says: I am an agent of the plaintiffs in this Territory. Neither of said plaintiffs are within the limits of this Territory to verify the above complaint, but the facts and statements contained in said complaint are true of my own knowledge, except such facts as are therein stated on information and
30 belief; and, as to facts so stated, I believe them to be true.

J. R. BOYCE.

Sworn to and subscribed before me this 12th day of September, 1868.

C. C. WILSON, *Judge, &c., &c.*

Endorsed:

Filed September 15th, A. D. 1868.

PATRICK LYNCH, *Clerk, &c.*

Summons.

In the district court in and for the 3d judicial district of the Territory of Utah.—Regular September term, 1868.—Hon. C. C. Wilson, Judge, &c., &c.

TOOTLE, LEACH & CO.
vs.
WM. S. GODBE AND JOHN M. WORLEY.

To the territorial marshal, or either of his deputies, greeting:

Whereas complaint has this day been filed on oath by the above-
31 named plaintiffs, and against the above-named defendants, a copy whereof is herewith furnished:

These are, therefore, to command you to summons the said Wm. S. Godbe and John M. Worley, personally, to be and appear before this court, at the court-house in Salt Lake City, to answer this complaint within two days after the service by you of this notice, to show cause, if any they have, why judgment should not be rendered against them as prayed for in said complaint.

Hereof fail not, and make due return of this summons.

Witness my hand and the seal of said court at my office, in Salt Lake City, this 15th day of September, A. D. 1869.

[L. S.] PATRICK LYNCH, *Clerk, &c.*

Endorsed:

SALT LAKE CITY, *Sept.* 16, 1868.

I hereby return this summons, having duly served the same by reading to the within-named defendants, and leaving a copy of complaint with defendant Wm. S. Godbe.

J. D. T. MCALLISTER,
Territorial Marshal,
P. R. W. MCALLISTER, *Deputy.*

32 *Answer.*

In the district court in and for the 3d judicial district, Territory of Utah.—Hon. C. C. Wilson, judge.—Sept. term, A. D., 1868.

TOOTLE, LEACH & CO.
vs.
WM. S. GODBE AND JOHN M. WORLEY. } Answer of Wm. S. Godbe.

William S. Godbe, one of the above-named defendants, makes this his separate answer to the complaint of plaintiff, & says that he admits the signing and delivery of the obligation set forth in the plaintiffs' complaint, jointly with the said John M. Worley, and admits the non-payment thereof, as set forth in said complaint, and for a defence to said action alleges that the said obligation was given by the above-named defendants on or about the [the] 10th day of November, A. D. 1865, to one Milton Moody, the agent of the above-named plaintiffs, in the city of Salt Lake, in part payment of a mule train purchase of the said Moody, agent as aforesaid, by the said John M. Worley, the said purchase being for the sole use and benefit of the said John M. Worley; and this defendant did sign said obligation at the request of the said John M.
33 Worley, but he signed the same only as surety for the said Worley; and that he did so sign it as surety as aforesaid, was then, on the said 10th day of November, A. D. 1865, well known to the said Tootle, Leach & Co., and their agent, the said Milton Moody; and he, the said Milton Moody, as agent as aforesaid, then and there accepted the said obligation and agreed to hold the said William S. Godbe as surety as aforesaid.

This defendant further alleges, that on or about the first day of August, 1866, at the maturity of said obligation, they, the said plaintiffs, had in their possession and control assetts and property, viz., two hundred sacks of good merchantable flour, the quality in said obligation mentioned, belonging to said John M. Worley, principal in the said obligation as aforesaid, and by him placed subject to the order and under the control of plaintiffs to satisfy the said obligation, and sufficient to fully discharge and pay the same at its maturity, but that the plaintiffs did thereafter release the same, and surrendered the control of the said assetts to the said Worley, without the knowledge or consent of this defendant, and greatly to his injury.

And for a further answer defendant says he is informed and believes, and so charges the fact to be, that the said plaintiffs did, on or about the 1st day of August, A. D. 1866, extend the time of payment
34 of the said obligation to the said John M. Worley, beyond the day of payment thereof, for a definite period, viz., for such time as he, the said John M. Worley, could go from Virginia City, Montana, to Salt Lake City, Utah, and return with his train; and for a valuable consideration to them promised and agreed to be paid by him, the said John M. Worley, viz., a more valuable lot of flour, viz., branded "SS" flour, being for a much greater value than that specified in the aforesaid obligation, without the knowledge or consent of this defendant, and greatly to his injury.

Defendant denies that the flour of the quality mentioned in said obligation, viz., "good, merchantable, Salt Lake flour," was on the first day of August, A. D. 1866, worth, in Virginia City, Montana, the sum of seventeen dollars per sack, and alleges that the market value of said flour, in said city and Territory, at the date of the maturity of said obligation, was nine dollars per sack.

Defendant alleges that shortly after the 1st day of August, 1866, the said John M. Worley became wholly insolvent, and has so continued, and still remains insolvent, and unable to pay his debts and obligations.

Wherefore this defendant prays to be hence dismissed, with his costs herein.

MARSHAL & CARTER,
Att'ys for Def'd't Wm. S. Godbe.

35 Thomas Marshal, being duly sworn, deposes and says that he is one of the att'ys of the above-named defendant, Wm. S. Godbe; that the said Wm. S. Godbe is unable to verify the foregoing answer, by reason of absence from the said Territory of Utah; that as such attorney, he has been fully informed relative to the facts set forth in the said answer, and from such information verily believes them to be true.

THOMAS MARSHALL.

Sworn to and subscribed before me this 19th day of October, A. D. 1868.

PATRICK LYNCH, *Clerk, &c.*

Endorsed:
Filed October 19th, 1868.

P. LYNCH, *Clerk, &c.*

Replication.

Third district court Utah Territory.—Hon. C. C. Wilson, judge.

TOOTLE, LEACH & CO., PL'FFS,
vs.
WILLIAM S. GODBE & JOHN M. WORLEY, DEF'TS.

36 The above-named pl'ff's, for replication to the answer of W. S. Godbe made herein, deny the allegations of said answer that said defendant W. S. Godbe signed the contract or obligation sued upon as surety for John M. Worley, and that this was known to plaintiffs or their agent at the time of the execution and delivery of said contract; also deny that said plaintiffs or their agent accepted said contract with the understanding that said Godbe was surety thereon, or that they agreed to hold him as such surety.

But plaintiffs allege that said defendant W. S. Godbe executed and delivered said contract or obligation as a principal maker and obliger in the same jointly and severally with the other defendant, J. M. Worley, and plaintiffs so accepted and understood said contract at time of its delivery; plaintiffs also deny that they had in their possession or under their control on the first day of August, 1866, or at any other time since the date of said contract, any assetts or property of any kind or value whatsoever belonging to John M. Worley, or that they ever surrendered and delivered up any assetts or property belonging to him as alleged; plaintiffs also deny the allegation in said answer, that they did, on or about the 1st day of August, 1866, or at any other time, extend
37 the time of payment of said contract for any definite period, or for any valuable consideration paid to plaintiffs, or promise to be paid to them as alleged in said answer.

Plaintiffs further deny any and all other allegations of said answer not admitted in said complaint and in this replication.

And for a further replication the plaintiffs say that the said John M. Worley has paid Wm. S. Godbe the sum of one thousand dollars on ac-

count of the contract sued on, and that if the said Wm. S. Godbe is in fact surety of the said John M. Worley, a fact which was never known to the plaintiffs or their agents, he has been indemnified by said payment to the amount of one thousand dollars.

Wherefore said plaintiffs ask the judgment prayed for in the complaint.

BASKIN & DE WOLFE,
Atty's for Pl'ffs.

Stephen De Wolfe, being duly sworn, deposes and says: I am one of the attornies of the plaintiffs mentioned in the foregoing replication. Neither of the plaintiffs are within this Territory and the jurisdiction of this court, and cannot therefore in person verify the statements of the foregoing replication; but said attorney upon information and
38 belief says the statements and allegations contained in the foregoing replication are true as he verily believes.

S. DE WOLFE.

Sworn to and subscribed before me on the 28th day of Oct., A. D. 1868.

P. LYNCH, *Clerk, &c.*

Affidavit for continuance.

In the 3d district court, Territory of Utah.—September term, A. D. 1868.

TOOTLE, LEACH & CO.
vs.
WM. S. GODBE ET AL.

Thomas Marshall, one of the attornies of the above-named defendant W. S. Godbe, said Godbe being absent from the Territory, being duly sworn, deposes and says that the said W. S. Godbe cannot safely go trial in the above cause for this—

That Charles Ohle, formerly of the firm of "McCormick & Ohle,' Virginia City, Montana, is a material witness for the said defend-
39 ants in the above action; that deponent expects to prove by the said Ohle, that in July and August, A. D. 1866, he was the resident partner of said firm in Virginia City aforesaid; that in July A. D. 1866, an arrangement was made with said firm by J. M. Worley, def't herein, whereby they, the said McCormick & Ohle, held subject to the order of said pl'ffs two hundred sacks of good merchantable flour, of the quality described in the obligation set forth in plaintiffs' complaint herein.

That said arrangement was made on or about the 15th of July, A. D. 1866; that subsequently thereto, a mutual arrangement was made between the said J. M. Worley and the plaintiffs, whereby said flour was on or about the 1st day of August, A. D. 1866, surrendered up to the said J. M. Worley; that at the maturity of said obligation, they, the said McCormick & Ohle, were ready to deliver said flour of the quality and quantity described in said obligation, and held the same subject to the order of, and control of plaintiffs.

That the said testimony is not cumulative, but deponent believes to be solely in possession of said witness.

That deponent has used great diligence in endeavoring to obtain the whereabouts of said Charles Ohle; that owing to the change, mu-
40 tations, incident to human affairs in these Territories, the said

Ohle had disappeared, and only after increasing enquiries, the deponent ascertained that the said Ohle was acting as purser in a steamer running to Portland, Oregon, from San Francisco, Cal.; that deponent only came into possession of said whereabouts of said Ohle on Saturday last.

And for a further cause of continuance deponent says that Milton Moody is a material witness for defendant Godbe in said action; that deponent expects to prove by the said Moody that, as the agent of said plaintiffs, he sold to the defendant J. M. Worley a mule-train in the year , and that in payment thereof he received, as such agent as aforesaid, the obligation on which this action was brought; that the defendant W. S. Godbe signed said obligation as surety for the said J. M. Worley; that he, as agent as aforesaid, accepted Wm. S. Godbe as surety on said obligation; and then and there, at the execution thereof, acting as agent as aforesaid, agreed to hold the said Wm. S. Godbe as surety only.

That the said Milton Moody, agent as aforesaid, suggested and named to the defendant J. M. Worley as surety as aforesaid.

That the said evidence is not merely cumulative, but defendant cannot prove the facts by other witnesses.

41 That the whereabouts of the said Milton Moody was not, after diligent enquiries, ascertained until Oct'r 30th, 1868, and then deponent merely learned that he was somewhere in Montana; that immediately thereupon the deponent wrote to Montana to Charles Dahler, to ascertain the particular whereabouts of said witness.

That deponent believes he will be able to procure the evidence of said Charles Ohle within thirty days of the date hereof; that he can obtain the evidence of the said Milton Moody in a less time.

And for a further cause for continuance in this cause deponent says that he has been unable to prove by any residents of this city the price of flour of the kind and quality in the said obligation mentioned on the 1st of August, 1866, in Virginia City, Montana; that the defendant Wm. S. Godbe expects to prove by John Creighton and George N. Hanna, of said last-named city, that on the 1st day of August, 1866, the flour of the kind and quality in said obligation mentioned was worth the sum, as a market value, of nine dollars per sack.

That the said evidence is not merely cumulative, and that the said evidence can be obtained in at least twenty days from this date.

42 That the deponent, since the commencement of said action, has applied to take the deposition of Thomas Tutt, esq., as to the price of flour of the kind and quality in said obligation mentioned 1st day of Aug'st, 1866, a resident of Virginia City, Montana, a merchant by occupation, and largely engaged in the flour market of said city at said time, 1st day of August, 1866; that at the time of said offer in this city said Thomas Tutt, then the attorney of said plaintiffs, refused to take such deposition, alleging that the defendants was not entitled thereto.

Deponent says that this affidavit is not made for the mere purpose of delay, but to the end that substantial justice may be done in the premises.

THOMAS MARSHALL.

Subscribed and sworn to before me this 4th day of November, A. D. 1868.

PATRICK LYNCH, *Clerk, &c.*

Endorsed: Filed Nov'r 4th, A. D. 1868.

PATRICK LYNCH, *Clerk, &c.*

43 *Rejoinder.*

In the district court for the 3d judicial district, Territory of Utah.

TOOTLE, LEACH & CO.
vs.
W. S. GODBE AND J. M. WORLEY. } Rejoinder of def'd't Wm. S. Godbe.

The above-named W. S. Godbe, for a rejoinder to plaintiff's replication herein, reasserts each and every allegation in said replication contained, except only such as have been admitted in this defendant's answer herein; and of this the def't Wm. S. Godbe puts himself upon his country.

MARSHALL & CARTER,
Att'ys for Def't Godbe.

W. S. Godbe, being duly sworn, deposes and says that he has read the foregoing rejoinder, and that the same is true, as he believes.

W. S. GODBE.

Sworn to and subscribed before me this 21st day of November, A. D. 1868.

PATRICK LYNCH, *Clerk, &c.*

44 Endorsed:
Filed Nov'r 21st, A. D. 1868.

PATRICK LYNCH, *Clerk, &c.*

Motion for a new trial.

In the district court, 3d judicial district, Territory of Utah.—April term A. D. 1869.—Hon. C. C. Wilson, judge.

TOOTLE, LEACH & CO.
vs.
JOHN M. WORLEY AND WM. S. GODBE. } Motion for a new trial.

Defendant Godbe, by his attorneys, moves the court for a new trial herein on the following grounds:

First. Def't W. S. Godbe made his separate and individual defence herein, and to sustain the same offered the testimony of his co-defendant, John M. Worley, a party to the cause, against whom a default had been taken, which testimony, on objection by plaintiffs' attorney, was by the court excluded, to which defendant excepted.

45 Second. Thereupon Godbe, by his attorney, tendered in court a release to the said Worley, and a discharge from all claims growing out of the subject-matter in suit, and also tendered the amount of costs which had accrued, and sufficient money to cover all possible costs, and again offered the said Worley as a witness, who, on objection by pl'ffs' attorney, was again declared incompetent, to which ruling defendants' attorney then and there excepted.

Third. Thereupon def'ts' attorney offered to show, by testimony, that the said Worley was insolvent; on his own petition been declared a bankrupt, but was not discharged by the court; and on such showing again offered the said Worley as a witness to support the separate and independent defence of the said Godbe, and again the said witness was excluded by the court.

Wherefore defendant W. S. Godbe respectfully moves the court for a new trial herein.

MARSHALL & CARTER, *Att'ys.*

46 Endorsed:
Filed May 8th, 1869.

P. LYNCH, *Clerk.*

Motion for a new trial overruled, and notice given of appeal to the supreme court, this 8th day of May, 1869.

P. LYNCH, *Clerk.*

Appeal bond.

Know all men by these presents, that we, Wm. S. Godbe, as principal, and John A. Latey and F. A. Mitchell as sureties, all of the city of Salt Lake, and Territory of Utah, are held and firmly bound unto Tootle, Leach & Co., of the Territory of Montana, in the sum of five thousand dollars, lawful money of the United States, to be paid to the said Tootle, Leach & Co., or their legal representatives, to which payment, well and t'uly to be made, we bind ourselves, jointly and severally, our heirs, executors, and administrators. firmly by these presents.

47 Sealed with our seals, and dated the 18th day of May, A. D. 1869.

The condition of this obligation is such that, whereas, on the 29th day of April, A. D. 1869, a judgment was rendered against the said Wm. S. Godbe, in the district court, 3d judicial district, Territory of Utah, in a certain cause wherein the said Tootle, Leach & Co. were plaintiffs, and John M. Worley and the said Godbe were defendants, for the sum of $\$2{,}490\frac{00}{100}$ dollars, and whereas the said Godbe is desirous of appealing the said cause to the supreme court of this Territory, and that said appeal should stay execution on such judgment until the hearing of the same in such supreme court: Now, therefore, if the said W. S. Godbe shall well and truly pay, or cause to be paid, the amount awarded against the appellant in the supreme court, and all costs that may accrue by reason of such appeal, then this bond shall be null and void; otherwise of full force and effect.

W. S. GODBE. [SEAL.]
J. H. LATEY. [SEAL.]
F. A. MITCHELL. [SEAL.]

Witnesses:
THOMAS MARSHALL.
J. J. H. THOMPSON.

48 Endorsed:
Approved May 18th, 1869.

PATRICK LYNCH, *Clerk, &c.*

Filed May 18th, 1869.

PATRICK LYNCH, *Clerk, &c.*

Bill of exceptions.

In the district court in and for the third judicial district, Territory of Utah.

TOOTLE, LEACH & CO. } Bill of exceptions.
vs.
JOHN M. WORLEY, WM. S. GODBE. }

Be it remembered that the issues in said action came on for trial on

the 29th day of April, A. D. 1869, before the Hon. C. C. Wilson, judge of said district court, at the regular April term of said court. A jury was called and sworn.

The defendant W. S. Godbe, to maintain the issues on his part,
49 offered in evidence the testimony of his co-defendant, John M. Worley, against whom a default had theretofore been taken.

Plaintiffs, by their counsel, objected to the introduction of said testimony, which objection was sustained by the court, to which ruling said Wm. S. Godbe, by his counsel, then and there excepted.

W. S. Godbe, defendant, by his attorney, tendered in court a release to the said co-defendant, J. M. Worley, and a discharge from all claims growing out of the subject-matter of this action, and also tendered the amount of costs which had accrued, and sufficient money to cover all possible costs, and again offered the said J. M. Worley, as a witness, to maintain the issues on his part; whereupon plaintiffs, by their counsel, objected to the introduction of said Worley as witness, which objection was sustained by the court, to which ruling the defendant Godbe, by his attornie, then and there duly excepted.

Defendant Godbe, by his attornies, offered to prove the insolvency of the said Worley, and that [and that] he had on his own petition been declared bankrupt but was not yet discharged by court, and in such showing offered again the said Worley as a witness to maintain
50 the issues on the part of said Godbe. To which the plaintiffs, by their attornies, objected, which objection was sustained by the court, to which ruling the defendant Godbe, by his attornies, then and there duly excepted.

To all of which foregoing the said defendant Godbe then and there duly excepted before the retirement of said jury, and assigns the foregoing as error.

Wherefore inasmuch as the matters aforesaid does not appear upon the record, the counsel for the defendant Godbe pray that this bill of exceptions be signed by the court and be made a part of the record in this cause.

MARSHALL & CARTER,
Att'ys for Def't W. S. Godbe.

(Signed) C. C. WILSON, *Judge, &c.*

Endorsed:

Filed June 4th, A. D. 1869.

PATRICK LYNCH, *Clerk, &c.*

51 *Record of court.*

1868. TOOTLE, LEACH & CO.
Nov. 3d. *vs.*
WM. S. GODBE & JOHN M. WORLEY.

Motion to strike the answer of John M. Worley from the files argued, and it was ordered by the court that defendant John M. Worley file his affidavit of merit to show cause of delay.

Nov. 4. Answer of John M. Worley withdrawn, whereupon it was ordered by the court that default be entered against the said John M. Worley.

Affidavit for continuance filed by counsel for W. S. Godbe,

co-defendant in the above-entitled case, and held under advisement.

1869. April 29. Case called, and issue being joined, the following jury was duly empannelled and sworn to try the case:

James Winchester, Wm. C. Niel, Joshua P. Williams, Festus Sprague, Lorenzo Pettit, Jesse Argent, John Rich, Newton Tuttle, Andrew Anderson, William J. Hooper, Joseph Morris, and John Gray.

52 Case opened to the jury by S. De Wolfe, esq., for plaintiffs, followed by Thomas Marshall, esq., for the defendant Wm. S. Godbe.

Defendants' counsel objected to the deposition of James R. Boyce, which objection was overruled by the court. Ruling excepted to by defendants' counsel. Deposition read.

John M. Worley called upon to testify on the part of the defendant Godbe. Objected to by R. N. Baskin, esq., on behalf of plaintiffs. Objection sustained by the court, and ruling excepted to by Mr. Marshall for W. S. Godbe.

Defendants' counsel introduced W. I. Appleby as a witness to prove that John M. Worley had filed his application in bankruptcy, and was not yet discharged, which done away with his interest as a co-defendant in the suit.

Plaintiffs' counsel objected, and objection sustained by the court. Ruling excepted to by Mr. Marshall for defendant Godbe.

Defendants' counsel offered to release J. M. Worley. Objected to.

Case given to the jury, who retire in charge of the proper officer to consider on their verdict.

The jury came into court, and, through their foreman, presented the following verdict:

53 "We, the jury in the case of Tootle, Leach & Co. vs. Wm. S. Godbe and John M. Worley, find judgment in favor of the plaintiffs, in the sum of twenty-four hundred and ninety dollars ($2,490 00.)

"April 29th, 1869.

"J. P. WILLIAMS, *Foreman.*"

1869. May 13. Thomas Marshall, esq., gave notice that he would file a motion for a new trial.

Motion for a new trial overruled, and the court having considered the verdict, it was ordered that the judgment be entered accordingly.

Whereupon it was ordered and adjudged by the court that the said plaintiffs have and recover off and from the said defendants the said sum of twenty-four hundred and ninety dollars, with interest thereon at the rate of ten per cent. per annum till paid, together with costs of suit, taxed at thirty-eight dollars & twenty-five cents, and that execution issue therefor.

Defendants' counsel gave notice of appeal. Whereupon it was ordered by the court that defendant file bond and bill of exceptions on or before the 20th inst.

54 JUNE 1.—The bond in this case being filed, it was ordered by the court that the appeal be perfected within ten days from date.

Bill of exceptions filed June 4th, 1869.

TERRITORY OF UTAH, *Salt Lake County, ss:*

I, Patrick Lynch, clerk of the 3d district court in and for Utah Territory, certify that the foregoing is a correct transcript of the original papers and record of the proceedings in the cause of Tootle, Leach & Co. vs. Wm. S. Godbe and John M. Worley in our said district court, as now on file and on record in my office.

In testimony whereof, I have hereunto set my hand and the seal of said court at my office in Salt Lake City this 5th day of June, A. D. 1869.

[SEAL OF 3D DISTRICT COURT.] PATRICK LYNCH, *Clerk, &c.*

55 TERRITORY OF UTAH, *City & County of Salt Lake, ss:*

I, W. I. Appleby, clerk of the supreme court in and for the Territory of Utah, do certify that the within and foregoing is a true copy of the record and proceedings had in said court, wherein William S. Godbe was appellant vs. Tootle, Leach & Co., appellees, as also a transcript of the record and proceedings had in the court below, as by me copied, and carefully compared with the original, remaining of record, and on file in my office; also the papers attached thereto issued in the case of the said William S. Godbe, plaintiff in error, vs. Tootle, Leach & Co., defendants in error, to the Supreme Court of the United States, at Washington City, D. C.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Salt Lake City, U. T., August 6th, A. D. 1869.

[SEAL.] W. I. APPLEBY, *Clerk, &c.*

(Indorsed:) William S. Godbe, plaintiff in error, vs. Tootle, Leach & Co., defendants in error. From the supreme court, Utah T'y, to Supreme Court, U. States.

(Indorsement on record:) Utah Territory, Sup. Court. No. 258. William S. Godbe, plaintiff in error, vs. Tootle, Leach and Co.

Filed 29th September, 1869.

TERRITORY OF UTAH, *Salt Lake County, ss:*

I, Patrick Lynch, clerk of the 3d district court in and for Utah Territory, certify that the foregoing is a correct transcript of the original papers and record of the proceedings in the cause of Tootle, Leach & Co. vs. Wm. S. Godbe and John M. Worley in our said district court, as now on file and on record in my office.

In testimony whereof, I have hereunto set my hand and the seal of said court at my office in Salt Lake City this 5th day of June, A. D. 1869.

[SEAL OF 3D DISTRICT COURT.] PATRICK LYNCH, *Clerk, &c.*

55 TERRITORY OF UTAH, *City & County of Salt Lake, ss:*

I, W. I. Appleby, clerk of the supreme court in and for the Territory of Utah, do certify that the within and foregoing is a true copy of the record and proceedings had in said court, wherein William S. Godbe was appellant vs. Tootle, Leach & Co., appellees, as also a transcript of the record and proceedings had in the court below, as by me copied, and carefully compared with the original, remaining of record, and on file in my office; also the papers attached thereto issued in the case of the said William S. Godbe, plaintiff in error, vs. Tootle, Leach & Co., defendants in error, to the Supreme Court of the United States, at Washington City, D. C.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Salt Lake City, U. T., August 6th, A. D. 1869.

[SEAL.] W. I. APPLEBY, *Clerk, &c.*

(Indorsed:) William S. Godbe, plaintiff in error, vs. Tootle, Leach & Co., defendants in error. From the supreme court, Utah T'y, to Supreme Court, U. States.

(Indorsement on record:) Utah Territory, Sup. Court. No. 258. William S. Godbe, plaintiff in error, vs. Tootle, Leach and Co.

Filed 29th September, 1869.

IN THE SUPREME COURT.

WILLIAM S. GODBE,
Plaintiff in Error.

vs.

TOOTLE, LEACH & CO.
Defendants.

In Error to the Supreme Court of Utah Territory.

No 396

~~*Defendants' Brief on*~~ ***Motion to Dismiss Writ of Error.***

Now come the defendants, by their attorney, R. N. Baskin, and move the court to dismiss the writ of error herein, for the following reasons, to wit:

First: — Because the judgment of the District Court of Utah, which is sought to be reversed by the proceedings in this court, is a joint judgment against the said William S. Godbe, and John M. Worley, and the said John M. Worley was not joined in the appeal, in error, from the District to the Supreme Court of said Territory; nor is he joined or named in the writ of error herein.

Second: — Because the judgment sought to be reversed is not properly described or identified in the writ of error.

Third : — Because the defendants are not named in said writ of error, otherwise than Tootle, Leach & Co.

R. N. BASKIN,
Attorney for Defendants in Error.

BRIEF OF DEFENDANTS ON MOTION TO DISMISS WRIT OF ERROR.

First : — On the first and second grounds of the motion it is unnecessary to do more than refer the court to the record and the following authorities, to wit:

Davenport v. Fletcher, 16 How., 142.

Wilson's Heirs v. Life and Fire Insurance Co., 12 Pet., 140.

Williams v. Bank of United States, 11 Wh. 414.

Tood v. Daniel, 16 Pet. 521.

8 Pt., 526, 12 How. 327.

Also, see Statute of Utah, p. 66, on subject of appeals in error.

Second : — As to the third ground of the motion it is sufficient to state that a writ of error is in the nature of an original action, and can no more be prosecuted against a firm, without naming the individual members composing the firm, than an original suit can be.

R. N. BASKIN,
Counsel for Defendants in Error.

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29.

U. S. SUPREME COURT.

DECEMBER TERM, 1869.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

THE HARTFORD FIRE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

Vs.

ISAAC VAN DUZER,
DEFENDANT IN ERROR.

Brief for Plaintiff in Error on Motion for a Supersedeas.

C. F. PECK,
For Plaintiff in Error.

Printed by W. H. Moore, 511 11th street, Washington, D. C.

Dismissed for no allegation of writ of Error at 23/70

No. 1, Indian Office
Old Store

Mo. for Supersedeas & Execution

In the Supreme Court of the United States.

THE HARTFORD FIRE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

12 Nov — —

vs.

ISAAC VAN DUZER, DEFENDANT IN ERROR.

Error to the Supreme Court of the State of Illinois.

Now comes the said plaintiff in error by its attorney, C. F. Peck, and moves the Court for a Writ of Supersedeas, or other equivalent order staying the operation of an execution in said cause. And for the grounds of said motion states, that the defendant in error, the original plaintiff, commenced his action in the Circuit Court of Iroquois County in the State of Illinois, to recover from the plaintiff in error, a sum of one thousand dollars alleged to be due on a certain contract for services rendered.

That the defendant in error, then the plaintiff, was a citizen of the State of Illinois, and the plaintiff in error, then the defendant, was a citizen of the State of Connecticut.

That immediately upon notice of the pendency of such suit, and at the time of entering its appearance thereto, viz: On the 19th of November, 1867, the plaintiff in error, filed his petition in said cause in pursuance of the act of Congress in such case made and provided, praying that said cause be removed to the Circuit Court of the United States, for the Northern District of Illinois, upon the ground of non-residence.

That the said application of the plaintiff in error was overruled, and the right of the plaintiff in error to the removal of said cause, was denied.

That such proceedings were afterwards had in such cause, that the venue in said cause was changed to the Circuit Court of Ford

County, in the State of Illinois, and that a judgment was there rendered in favor of the defendant in error, for the sum of five hundred dollars and costs.

That an appeal was prosecuted from such judgment by the plaintiff in error, to the Supreme Court of the State of Illinois, and that the judgment of the said Circuit Court of Iroquois County, was there in all respects affirmed.

That the said Supreme Court of the State of Illinois, at its January Term, 1869, heard the said cause on appeal and took the same under advisement; but no decision had been announced or recorded in said cause, but the same was still held under advisement, when the said Supreme Court adjourned for its January Term. That more than ten days subsequent to such adjournment, a decision was made by the Judges of the said Supreme Court, and was recorded in said Court as of the Term at which the cause was heard.

That as soon as the agents of the plaintiff in error discovered that such decision had been made by the said Supreme Court, they prosecuted a writ of error to this Court without delay. That such writ of error was of necessity and without the fault of the plaintiff in error, more than ten days subsequent to the rendition of the judgment of the said Supreme Court of the State of Illinois.

That said writ of error has been in all respects perfected by giving the required bond, and serving a citation on the defendant in error and the record has been filed in this Court.

That the defendant in error has caused an execution to be issued upon the said judgment to the Sheriff of Cook County, Illinois, in his favor, and is now seeking to enforce the same against the propty of the plaintiff in error.

That the defendant in error is insolvent and irresponsible, and that the plaintiff in error has a large amount of property both real and personal in the State of Illinois, which can be subjected to the payment of any debt established against it.

Wherefore it is prayed that a Writ of Supersedeas may be issued out of this Honorable Court, restraining the Sheriff of Cook County, the Clerk of the Circuit Court of Iroquois County, in the State of Illinois, and the defendant in error, from further proceedings for the collection of said judgment until the hearing of the said cause in this Court.

And for proof of the facts herein stated, the plaintiff in error refers to the record of said cause on file and the affidavit of George F. Bissell filed herewith.

C. F. PECK,
Atty. for Plff. in Error.

IN THE SUPREME COURT OF THE UNITED STATES AT THE CITY OF WASHINGTON.

THE HARTFORD FIRE INSURANCE COMPANY,
Plaintiff in Error,
vs.
ISAAC VAN DUZER.

Writ of Error to the Supreme Court of the State of Illinois.

George F. Bissell, being duly sworn, says that he is the General Agent for the Northwestern States of said plaintiff in error; and as such agent has charge of the above entitled suit;—that said suit is now pending in the said Supreme Court of said State of Illinois; that such writ has been served on William A. Turney, Esq., as the Clerk of said last named Court, who, as such clerk, has heretofore duly certified into the said Supreme Court of the United States, the record in said cause, and such record is now on file in said last named Court. And affiant further says, that due service of the citation to said defendant in error, Isaac Van Duzer, has been had, as will fully appear by reference to the written acknowledgement of such service in the handwriting of said Van Duzer, endorsed upon the citation on file in said cause in said Supreme Court of the United States. Affiant further says, that since the service on him of said citation and since the pendency of said cause on error as aforesaid, said Van Duzer has placed in the hands of the Sheriff of Cook County in the State of Illinois, a certain Writ of Fieri Facias upon the judgment of the Circuit Court of Ford County in said State of Illinois in question in this cause, a copy whereof is hereto annexed and made a part hereof Affiant further says, that said Van Duzer and said Sheriff are now threatening to levy, and unless restrained by order of this Honorable Court, will levy the said execution upon and sell the property of the said plaintiff in error within ninety days

from the date of said execution, and as soon as they conveniently may; and that affiant well fears that said sale will take place long before any action of this Honorable Court can be had upon a hearing of the errors to be assigned on said record, and that it is the intention of said Van Duzer, by the use of said execution, to deprive the said plaintiff in error of all practical benefit of a reversal of the decision of said State Supreme Court, by collecting said judgment on said *fieri facias* before and in anticipation of such reversal. That said Van Duzer is so unsettled in his circumstances and residence, and so irresponsible in pecuniary means, that any action or recourse upon him, in case of such collection and subsequent reversal in this proceeding, would be utterly worthless. That affiant has made inquiry as to the solvency and circumstances of said Van Duzer, and from such inquiries cannot learn that said Van Duzer has property liable to execution sufficient to make the amount of a judgment of five hundred dollars and costs, or any considerable part of such sum, and affiant verily believes that such a judgment could not be made by execution against the property of said Van Duzer. And affiant further says, that said plaintiff in error has ample property real and personal in said County of Cook, out of which said Van Duzer can make the amount of said judgment in said execution mentioned, and that in case this Honorable Court affirm said judgment of the said State Supreme Court, the said judgment of said Ford County Circuit Court will be promptly paid without execution thereon.

Affiant further says, that the judgment of said Ford County Circuit Court (to collect which is the object of said execution copied as aforesaid) was for the sum of five hundred dollars and costs, which, as affiant is informed by counsel and verily believes, was rendered by said Circuit Court of Ford county, after that court had, by the proper proceeding under the act of Congress in such case provided, been ousted of all jurisdiction to render the same, and been required by such act to remove said cause into the Circuit Court of the United States, and that, therefore, as affiant, on behalf of said plaintiff in error, intend to submit to this Honorable Court, among other questions, the said judgment should be reversed in this proceeding; but for greater certainty as to the matters involved in said proceeding, affiant craves leave to refer this Honorable Court to the record aforesaid.

And affiant further says, that the decision of said Supreme Conrt

of said State of Illinois was not in fact rendered by that Honorable Court until some time in the vacation after the term at which the cause was argued, of which time neither said plaintiff in error nor its attorney or agents had notice, and that the time of such decision was more than ten days after the last day of the term at which said cause was argued; and that as affiant is informed and believes, the said cause appears of record as having been decided at the term at which it was argued, and not at the time of such decision in vacation as aforesaid.

And affiant further says, that as soon as he learned that said decision had been made, he procured a copy thereof, and has ever since used all possible means to speed the hearing of this writ of error before this Honorable Court, and fully and in good faith intends in future so to do; and further, he says not.

GEORGE F. BISSELL.

UNITED STATES OF AMERICA, } ss.
Northern District of Illinois, }

Subscribed and sworn this 30th day of October, A. D. 1869, before me, Clerk of the United States Circuit Court, northern district of Illinois, as witness my hand and official seal, the day and year aforesaid.

[SEAL.] WM. H. BRADLEY, *Clerk.*

[Copy.]

STATE OF ILLINOIS, } ss.
Ford County. }

The people of the State of Illinois,
To the Sheriff of Cook County, Greeting:

We command you that of the lands and tenements, goods and chattels of the Hartford Fire Insurance Company, defendant, in your county, you cause to be made the sum of five hundred dollars and — costs, which Isaac Van Duzer, plaintiff, lately in the Circuit Court of Ford County at a term thereof, begun and held at Paxton, in said county on the —— Monday of October, A. D. 1868, recovered against the said defendant and by which the said Court was adjudged to said plaintiff for his damages by him in his behalf sustained, and also the further sum of forty-nine dollars and forty cents, which were adjudged to the said plaintiff for his costs

and charges in that behalf expended, whereof the said defendant stands convicted as appears to us of record, and have you these moneys ready to render to the said plaintiff for damages and costs aforesaid, and make return of this writ with an endorsement thereon, in what manner you shall have executed the same within ninety days from the date thereof. Witness L. A. Dodd, clerk of our said Court and the seal thereof, at Paxton in said county, the 10th day of September, A. D. 1869.

[SEAL.] LEVI A. DODD,
Clerk.

This is a true copy.

GUSTAV FISCHER,
Sheriff, Cook County, Illinois.

Execution F. I. F. A., Ford County Circuit Court. Fee Book 2, page 100. Record —, page —. Whole No. 431. Term No. —. Execution No. 335. Isaac Van Duzer vs. Hartford Fire Insurance Company.

Debt,	$
Damages,	500.00
Costs,	49.40
	549.40

Sheriff will collect interest from Oct. 8, 1868.

L. A. DODD, Clerk.

Sheriff's fees, $
Levying Execution,
Advertising property,
Miles travel,
Commission on $
Returning Execution,
Certificate of purchase,
Filed — day of ——, A. D. 186
Rec'd at 10 a. m., 20 Oct., 1869.

Supreme Court of the United States.

HARTFORD INSURANCE COMPANY
vs.
ISAAC VAN DUZER.
No. 281.

BRIEF OF T. LYLE DICKEY FOR APPELLEE, ON MOTION FOR SUPERSEDEAS.

This supersedeas is not claimed upon the ground that there is probable error in the record. There are no equities there to incline the court to grant this motion, and it will only be allowed upon the ground that plaintiff in error has, without laches on his part, been deprived of a legal right to a supersedas.

The record shows that the judgment was rendered and entered of record on the 15th of February, 1869.

The bond was executed, approved, and filed on 18th day of September, 1869, more than ten days after the judgment.

It is alleged that in fact the judgment was not rendered till the 10th of June, 1869. The evidence adduced is the affidavit of Bissell, that it was long after the adjournment of the court; but he don't say when, or show that he has really any means of knowledge on the subject, nor does he say when he or his principals first knew of the judgment. He further says, that "*as soon as he learned* that said decision *was made* he *procured a copy thereof*, and has ever since used all possible means *to speed the hearing of this writ.*" He does not say that he filed his bond in ten days after the judgment was in fact entered, nor even within ten days after he knew that judgment was entered. On the contrary, the copy of the

record which "*he procured*" bears date on the 3d day of September, 1869, (Rec., p. 155,) fifteen days before his bond was made. (Rec., p. 159.)

So it appears plaintiff in error is not within the statute as to the time of filing his bond, whether the ten days are held to begin to run on the 15th day of February, 1869, when the record says judgment was rendered, or begin on the 10th of June, when the clerk certifies the judgment was entered, or begin to run on the 3d day of September, when plaintiff in error "*procured*" his copy of the record.

Plaintiff has not placed himself within the statute and is not entitled by law to the supersedeas.

Since writing the above I have examined Conkling's Treatise, 3d edition, and find (pp. 679, 680) that a writ of error shall be a supersedeas *only* where a copy thereof is lodged for the adverse party in the clerk's office *where the record remains*. Now no effort was made by the party to serve the writ in that way. No copy has ever been filed, so far as appears, in the office of the clerk of the Supreme Court.

In looking further I find *the writ of error in this case* was never *allowed* by any judge of the circuit court, and must be dismissed. (See opinion in case of Gleason *vs.* State of Florida, decided at this term.

T. Lyle Dickey,
For Van Duzer.

This has been shown to Mr. Peck. T. L. D.

In the Supreme Court

OF

THE UNITED STATES.

No. 244. DOWNHAM & Co., Plaintiffs in Error.

vs.

THE CITY COUNCIL OF ALEXANDRIA.

In error to the District Court of Appeals for the Fourth Judicial District of Virginia.

The City Council of Alexandria moves to dismiss this writ of error because the Court to which it issued, viz: the District Court for the Fourth Judicial District of Virginia, is not the highest court of law of the State of Virginia in which a decision could be had in this suit.

That as the constitutionality of a law and the right of a corporation to levy taxes were involved, the Supreme Court of Appeals of Virginia, without reference to the amount at stake, had, under the following clauses of the Constitution and Statutes of Virginia, appellate jurisdiction in this suit.

Cons. of Va. of 1864, Art. 6, Sec. 11. The Supreme Court of Appeals shall consist of three judges so chosen, any two of whom may hold a court. It shall have appellate jurisdiction only, except in cases of *habeas corpus*, *mandamus* and prohibition. It shall not have jurisdiction in civil cases where the matter in controversy, exclusive of costs, is less in value or amount than five hundred dollars, except in controversies concerning the title or boundaries of land, the probate of a will, the appoint-

ment or qualification of a personal representative, guardian, committee or curator; or concerning a mill, road, way, ferry or landing, or the right of a corporation or of a county to levy tolls or taxes, and except in cases of *habeas corpus*, *mandamus* and prohibition, and cases involving freedom or the constitutionality of a law.

The above section with reference to the jurisdiction, both original and appellate, of the Supreme Court of Appeals of Virginia is the same as Sec. 11, Art. 6, of the Constitution of 1851, and the same as Sec. 2, Art. 6 of the Constitution adopted July 6th, 1869, and now in force, excepting that the provision for an appeal in cases of freedom as a matter of course is omitted.

In 1852, shortly after the adoption of the Constitution of 1851, the Legislature of Virginia enacted the following:

"Sec. 16. When an appeal, writ of error or supersedeas is hereafter allowed to or from a judgment, decree or order of a Circuit Court in a civil cause of which the Supreme Court of Appeals is prohibited from having jurisdiction by the eleventh Section of the Sixth Article of the Constitution, such appeal, writ of error or supersedeas shall be docked in the district court for the district constituted in part of the circuit wherein the judgement, decree or order were made or rendered." Code of 1860, Chap. 182.

On March 3d, 1866, the preceding Section was amended and re-enacted in the following manner:

SEC. 16. No appeal, writ of error or supersedeas shall be allowed to or from a judgement, decree or order of a district court in any case in which the judgement, decree or order of the circuit court is wholly affirmed as to matters of substance, unless the said district court shall enter of record, at the same term at which the case is decided, that it involved questions of such novelty or difficulty as to make it proper that it should be finally determined in the Supreme Court of Appeals. In any such case, and in any other case decided in a district court, in which the supreme court of appeals is not prohibited by the constitution from taking jurisdiction, an appeal, writ of error or supersedeas shall lie to or from the supreme court of appeals.

On February 27th, 1867, this section was further amended and now reads as follows:

"No appeal, writ of error, or supersedeas shall be allowed to or from a judgment, decree or order of a District Court, in any case in which the judgment, decree or order of the Circuit Court shall be wholly affirmed

as to matters of substance, and in which the subject matter in controversy shall not exceed one thousand dollars, unless the said District Court shall enter of record, at the same time at which the case is decided, that it involved questions of such novelty or difficulty as to make it proper that it should be finally determined in the Supreme Court of Appeals; and in any other case decided in the District Court, in which the Supreme Court of Appeals is not prohibited by the Constitution from taking jurisdiction, an appeal, writ of error or supersedeas shall lie to or from the Supreme Court of Appeals."

It is respectfully submitted that under the Constitution and Laws of Virginia from the year 1852 up to the present time in all cases like the present one, involving the constitutionality of a law and the right of a corporation to levy taxes, the Supreme Court of Appeals of the State, without reference to the amount in controversy, was entitled to appellate jurisdiction, and as this case has never yet been presented to that Court it would seem that as the judgment in question is not of the highest court of State which has jurisdiction of the suit, the motion to dismiss should be sustained.

Vide Weston vs City Council of Charleston, 2 Pet. 449, Matheson vs. Branch Bank of Mobile, 7 How. 260, Neilson vs. Legow, 12 How. 98, Gelston vs Hoyt, 3 Wheaton 246, Webster vs. Reid, 11 How. 437.

D. L SMOOT,

Attorney for the City Council of Alexandria.

IN THE

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1869.

THE HARTFORD FIRE INS. CO.
PLAINTIFF IN ERROR,
vs.
ISAAC VAN DUZER,
DEFENDANT IN ERROR.

Brief for Plaintiff in Error on Motion for a Supersedeas.

This is a motion for a *supersedeas* or other order of this Court to stay proceedings upon the judgment rendered in the Court below.

Error to the Supreme Court of the State of Illinois.

The defendant in error, the original plaintiff, commenced his action in the Circuit Court of Iroquois County in the State of Illinois, to recover from the plaintiff in error, a sum of one thousand dollars alleged to be due on a certain contract for services rendered.

The defendant in error, then the plaintiff, was a citizen of the State of Illinois, and the plaintiff in error, then the defendant, was a citizen of the State of Connecticut; immediately upon notice of the pendency of such suit, and at the time of entering its appearance, the plaintiff in error filed his petition in said cause in pursuance of the act of Congress in such case made and provided, praying that said cause be removed to the Circuit Court of the United

States, for the Northern District of Illinois, upon the ground of non-residence.

This application of the plaintiff in error was overruled, and the right of the plaintiff in error to the removal of said cause, was denied.

Such proceedings were afterwards had in such cause, that the venue in said cause was changed to the Circuit Court of Ford County, in the State of Illinois, and a judgment was there rendered in favor of the defendant in error, for the sum of five hundred dollars and costs.

An appeal was prosecuted from such judgment by the plaintiff in error, to the Supreme Court of the State of Illinois, and the judgment of the said Circuit Court of Iroquois County, was there in all respects affirmed.

The said Supreme Court of the State of Illinois, at its January Term, 1869, heard the said cause on appeal and took the same under advisement; but no decision had been announced or recorded in said cause, but the same was still held under advisement, when the said Supreme Court adjourned for its January Term.

More than ten days afterwards and in fact several months afterwards that Court arrived at its judgment in the matter and filed an opinion which, according to the usual practice, was recorded as of the last day of the term.

As soon as the agents of the plaintiff in error discovered that such decision had been made by the Supreme Court, they prosecuted a writ of error to this Court without delay. Such writ of error was of necessity and without the fault of the plaintiff in error, more than ten days subsequent to the rendition of the judgment of the said Supreme Court of the State of Illinois.

Said writ of error has been in all respects perfected by giving the required bond, and serving a citation on the defendant in error and the record has been filed in this Court.

The defendant in error has caused an execution to be issued upon the said judgment to the Sheriff of Cook Coun-

ty, Illinois, in his favor, and is now seeking to enforce the same against the property of the plaintiff in error.

The defendant in error is insolvent and irresponsible, and the plaintiff in error has a large amount of property both real and personal in the State of Illinois, which can be subjected to the payment of any debt established against it.

Upon the filing of the petition, affidavit and bond the defendant (now plaintiff in error) became entitled to have the cause transferred to the U. S. Circuit Court. All other proceedings in the State court after that were *coram non judice* and void.

Kanouse vs. *Martin*, 15 Howard, 198.
Gordon vs. *Longest*, 16 Peters, 104.

This right could not be affected by a reduction of the *ad damnum* in the declaration.

Kanouse vs. *Martin*, 15 Howard, 198.
Ladd vs. *Tudor*, 3 Woodb. & M., 325.
Muns vs. *Dupont*, 2 W. C. C., 463.

The 12th section of the judiciary act applies to a case in which a foreign corporation is defendant.

Bliven vs. *New England Screw Co.*, 3 Blatch., 111.
Barney vs. *Globe Bank*, 11 Am. L. R., 221.
Sayles vs. *N. W. Ins. Co.*, 2 Curt., 212.

The Supreme Court of the State of Illinois had adjourned for the term without deciding the cause, and more than ten days had elapsed when the decision was made and entered *nunc pro tunc*. By this action the plaintiff in error, without fault of its own, was prevented from obtaining a *supersedeas* in the usual manner.

This court has the power, and where the circumstances render it necessary it will issue a writ of *supersedeas*.

Stockton vs. *Bishop*, 2 How., 74.
Hardeman vs. *Anderson*, 4 How., 640.
Ex parte Milwaukie R. R. Co., 5 Wallace, 188.

C. F. PECK,
For Plaintiff in Error.